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Reflection on Fair and Equitable Treatment Standard in China's Practice

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Abstract: International investment law always emphasizes the importance of improving the Fair and Equitable Treatment (FET) standard. Though many studies have summarized several new changes in the FET standard worldwide in recent years, there is a lack of effective evaluation and unified explanation for China's FET standard practice. Therefore, this paper aims to expound the hidden problems and solutions to China's application of the FET standard by exploring the developments of the FET standard in terms of treaty design and arbitration interpretations in recent years. The paper finds that states turn to impose a restriction of the scope of protection in bilateral investment treaties & international investment agreements as well as polish FET clauses in a more precise way, while the overall design of the FET standards in China remain backward. In addition, arbitration tribunals have more specific interpretations of the connotation of FET, but China's lack of arbitration experience makes it difficult to optimize FET clauses through arbitration interpretations. Therefore, this paper suggests China should specify its FET clauses in semi-closed enumeration method and more precise expression and systematically study tribunal interpretations of the FET standard elements as reference.

Keywords: Fair and Equitable Treatment standard, practice in China, treaty design, Tribunal interpretations.

1. Introduction

International investment treatment, the rights and obligations that foreign investors enjoy when investing overseas, constitutes the basis of the host country's investment environment and confirms the legal status of foreign capital there. As an essential standard of treatment, the Fair and Equitable Treatment (FET) standard safeguards foreign investors against host countries by imposing a unilateral obligation on them when investors' legitimate expectations are affected by their domestic policies in an abrupt, inconsistent, and arbitrary manner. As an absolute standard of treatment, the FET provision can be invoked without referring to other standards, such as domestic regulations of the host country. Therefore, it is regarded as a useful legal basis for investors to demand huge compensation from host states. Despite the importance of the FET standard, its ambiguity has led to inconsistent and contentious interpretations in arbitration. To avoid unjust restrictions over the regulatory power of host states as well as promote the certainty of the FET provision, states and tribunals have made efforts through treaty reform and arbitration practice for decades and have gained some achievements.

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Under the guidance of China's opening-up policy, China has achieved an evolution of its role from a capital-importing power to a capital-importing and capital-exporting power. At present, China is still the world's second largest importer of capital [1]. As of 2023, China has maintained its ranking among the top three in the world for 11 consecutive years with their foreign direct investment in non-financial institutions, and its stock of foreign investment has consistently been among the top three in the world for six years [2]. In recent years, China has signed several new bilateral investment treaties (BIT) and free trade agreements with foreign countries, which generally include the FET standard. However, China's FET clauses in treaties and agreements remain backward in design, preventing it from adapting to the increasing risks of overseas investment.

Going through the existing research on the FET standard, overall, foreign scholars started earlier and produced more studies, more diverse angles as well as further research on its connotation. However, there is still no systematic summary to its key developments in recent years. Chinese scholars conducted research mainly on its definition, connotation of elements and reform proposals, but paid inadequate attention to the arbitration practice involving the FET provision in recent years. Hence, the evaluation of China's current practice in the FET standard deserves further study to offer guidance for China's subsequent improvement.

This paper aims at exploring the developments of the FET standard in terms of treaty design and arbitration interpretations in recent years and expounding the hidden problems and solutions to China's practice in the FET standard. The methodologies employed in this paper consist of literature analysis, comparative research and case study. Specifically, the paper will go through the texts of treaties and agreements, arbitration awards, journal articles and working files of United Nations Commission on International Trade Law (UNCITRAL) and Organization for Economic Co-operation and Development (OECD) to compare the latest developments of the FET provision in investment treaties of various countries including European Union, United States, India and so on. Plus, arbitration cases in recent decades will be analyzed to detect the features of interpretation methods applied by tribunals. Subsequently, this paper will point out challenges existing in China's practice in the FET standard with comparison to the reform achievements of other countries and propose concrete suggestions in line with China's national conditions as well as the latest trend the FET standard develops.

Although China's participation in investment arbitration is actually limited, as a major capital importer, it's beneficial to study the latest FET standard in advance so that China can effectively prevent tribunals from abusing its discretion in future investment arbitration and undermining China's regulatory power. Meanwhile, due to the continuous expansion of China's overseas investment, a better-designed FET standard also enables Chinese investors to make a successful claim when their relevant interests get infringed by host states.

2. The evolution and developments in the FET standard

2.1. Introduction of the FET standard

The origin of the FET standard can trace back to Havana Charter in 1948, which requires proposed International Trade Organization to 'assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another'[3][4]. While the first appearance of the FET clause in treaties is in the bilateral Friendship, Commerce and Navigation treaties (FCNs) between the USA and its partners [5]. The 1959 Abs-Shawcross Draft Convention was influenced by this and was later included in the influential 1967 OECD Draft Convention on the Protection of Foreign Property [6]. Over time, the FET standard gained a wide application in treaties with a further surge in bilateral investment treaties between developed and developing countries. As of 2020, FET clauses have been introduced in over 2500 investment treaties and chapters [7]. In short,

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the FET standard has been promoted along with the development of neoliberalism and has always focused on protecting overseas investors' legitimate expectations from undue host government interference.

Semantically, fairness requires treating others in an equal or reasonable manner [8], so fair treatment aims to achieve equal treatment among all parties. Equity is an inalienable right containing fairness and justice [8]. As Article 42, paragraph 3 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States defines, tribunals should apply the laws fairly so as to avoid unreasonable results [9]. However, due to the elusive legal terms 'fair' and 'equitable', the FET standard remains vague in scope, so other methods are employed to interpret this standard, such as linking FET standard with minimal standard of treatment (MST) or customary international law (CIL).

In the earliest treaties, most simply defined that 'in all cases the Contracting Parties shall accord these investments fair and equitable treatment' [10] rather than clarified what kind of behaviour violates the FET standard. Later, some treaties explained that FET should be granted in accordance with or at least as required by international law [11]. It was not until the 1990s that international investment agreement (IIA)s began to refer to MST [12] when interpreting FET. Although MST and CIL have long been utilized to interpret the FET standard, the FET standard can hardly be considered an equivalent to MST or CIL. Firstly, the FET standard is designed to attract investment with a legal commitment to protect legitimate interests of foreign investors, while MST aims to safeguard the personal and property safety of foreigners from an unacceptable evil act by the host government under international law. Besides, except generality of state practice, there is no uniform and consistent state practice within BITs and IIAs or outside BITs' framework as well as opinio juris to prove that FET has become a rule of CIL [13], but MST's formation requires both elements mentioned above.

Although the FET standard should work as an independent standard of treatment, its vagueness has stimulated heated discussion. Radi defines the FET standard as "a normative outcome of balancing legislative process aiming at the protection of foreign investors against discriminatory and arbitrary state conduct [14]." Muchlinski explains in more detail that specific facts of each case decide the meaning of the FET standard [15]. As Mann states, its terms should be comprehended and utilized in an independent and autonomous way [16]. They argue that what does FET means cannot be solved on a purely semantic level [17]. The arbitration tribunals' inconsistent interpretations of FET clauses also confirm the difficulty to get a fixed and precise elaboration of the FET provision, but states, tribunals and scholars continue to make efforts to conquer its vagueness.

2.2. New developments in the FET standard

The two decades of practice in Investor-State Dispute Settlement (ISDS) as well as reforms in investment treaties have actually improved precision of the connotation of the FET standard.

With regard to the treaty design of the FET standard, BITs & IIAs begin to impose restrictions over the scope of protection in FET in varying degrees. Tribunals used to impose FET obligations on host countries in such a broad manner that any regulatory action that would affect investors' profits could be challenged in arbitration [18]. For fear of unjust restriction over their regulatory power, states take actions against tribunals expansive protection of investor rights through FET clauses. Some issued interpretations to bind tribunals like North American Free Trade Agreement (NAFTA)[19]. In order to limit possible claims, other states have begun to clearly specify FET obligations in newly-created BITs [20].

Newer IIAs have introduced limitations of the FET provision by adding a list of typified violations. The forms of expression can be divided into three categories. The first is the open-enumerated method of "including but not limited", which is applied by the United States, Canada, Mexico [21] and etc. The second is the full-enumerated approach adopted by India [22] and Iran [23], leaving no room for

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states to adjust their content in the future. The third is the semi-enumerated list method accepted by the European Union. For example, Article 8.10 of Comprehensive Economic and Trade Agreement (CETA) , signed between the EU and Canada in 2016, lists a number of constituent elements and also lists reasonable investor expectations as considerations. Besides, Article 8.10 of CETA also ensures flexibility of enumeration by providing an alternative mechanism that allows parties to adapt the elements of the obligation to their specific circumstances [24].

Moreover, the wording of FET clauses turns more specific and precise. For instance, CETA makes the determination of undermining foreign investor's reasonable expectation clear that investors have legitimate expectations due to the host country's specific commitment, but the host government subsequently undermines them. The Transatlantic Trade and Investment Partnership Agreement (TIPP) [25] restricts the elements of the FET standard more precisely by adding limitations on the degree of "due process" and "transparency requirement".

In terms of tribunals' interpretations of the FET standard, it becomes increasingly specific but still remains inconsistent. Firstly, more elements emerged to elaborate the FET provision, constituting a more detailed explanation of the FET standard. Specifically, the UNCTAD study in 2011 issued four elements, which include denial of justice, due process, undermining foreign investors' legitimate expectations, apparently arbitrary decisions and outright abusive treatment and discrimination. As tribunals awards relating to FET accumulate, other elements have been taken into account gradually. After investigating awards as of 2020 (207 in total), there have been 16 frequently-referred-to terminologies in tribunals' interpretations of the FET standard, including due process, denial of justice, protection of legitimate expectations, discrimination, arbitrariness, transparency, bad faith, stability, unreasonableness, coercion/harassment, proportionality, unjust treatment, idiosyncratic treatment, due diligence, international law, and CIL/MST [7].

More importantly, with the reform of treaties and the accumulation of arbitration, several legal elements mentioned above have been further elaborated by tribunals, such as legitimate expectations, stability, arbitrariness and so on. Take the most controversial element of legitimate expectations as an example. Bonnitcha summarizes a series of four methods to interpret legitimate expectations in ISDS practice [26]. The first method refers to the presence of vested rights upon investors ensured by host States, which offers the narrowest scope of legitimate expectations because investors are vested enforceable embedded in the regulatory framework [27]. The second one focuses on host countries' specific statements to foreign investors, of which the key lies on host governments unilateral statements and stances which affected investment(s) and investors' reliance on them [28]. The third interpretation method refers to the host countries' domestic regulatory framework in place when investors investing [29][30]. The key factor to discern expectations based on regulatory stability covered and protected by the FET provision thus relates to whether the modified regulation a fundamental element of the legal framework that governed the investment at the time it was initiated [26]. The fourth approach, adopted in MTD v. Chile and Walter Bau v. Thailand, is reasoning projects legitimate expectations on investors' business decisions, which looks at the consistency of the host States conduct. These methods link the identification of legitimate expectations to four different material elements assessed on a fact-specific basis, which actually offers further justification of requirements of the elements in FET standard.

In spite of the developments above, there is still a long way to go for tribunals to form a unified interpretation on the key elements of the FET standard reasonableness of the expectation remains inconsistently addressed. Besides, potential spillovers and crossovers among the key elements of ISDS tribunals reasoning still need to be studied. Other elements also face with these problems to different degrees. Although, researching on precedent is still crucial to understand the connotation of FET elements.

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3. The present and the future of the FET standard in China

3.1. Challenges in the present of the FET standard in China

Statistics shows that as of June 2023, 51 out of 104 BITs and 1 out of 9 free trade agreements signed by China still apply the broadest description of the FET standard without listing specific elements of identification [31], which lags behind the latest development of FET standard. Furthermore, since 2008, some FET provisions of the treaties China signed appeared to use the enumeration method, and the open-enumerated mode adopted by United States is preferred. Practice still indicates that there is not a unified answer to the question of which method, the open-enumerated method or the full-enumerated method, is more suitable for China's national conditions. For instance, China-Peru Free Trade Agreement, Art132 and China-New Zealand Free Trade Agreement, Art143 both use the open-enumerated method to define the FET standard, while China-Uzbekistan Economic and Trade Agreement, Art 5 uses the full-enumerated method.

One reason may account for China's backward design of FET clauses is that China has long participated in international investment as a capital-importing country with more attention to attracting overseas investment through safeguarding the interests of investors when designing treaties and agreements. Recently, since China has gradually become one of the top states in the amount of foreign direct investment flow, it needs to transfer its position to a major capital-exporting country and make dual considerations about the reasonable reservation of host government's regulatory power and the adequate protection of investors' interests. What's more, the lack of direct participation in international investment arbitration also lowers China' s pace to learn and improve its FET clauses as tribunals' elucidation of FET elements is often a source of learning for states and they often critically evaluate their content at different levels. As a result, their standards for investment protection as mandated in BITs and IIAs have become clearer [7].

What's more, China lacks practical experience in dealing increasing overseas investment disputes. Although the number of arbitration cases involved in China has increased in recent years, the overall proportion is relatively small. As of December 31, 2023, a total of 967 international investment arbitration or mediation cases were registered with International Centre for Settlement of Investment Disputes (ICSID). Among which there were 19 cases in which China was the home state of claimants and 9 cases as the respondent country [32]. Second, China lacks international legal talent resources. The degree of internationalization of arbitrators is relatively low compared with other countries. A total of 15 Chinese people have been appointed as investment arbitrators in ICSID investment arbitration cases, compared with 302 appointed by the United States and 298 by France [33]. It may lead to the risk of the loss of action due to China's inability to skillfully apply international investment arbitration rules and interpret disadvantages when facing arbitration cases involving the FET standard.

3.2. The reform suggestions of the FET standard in China

First of all, the open-enumerated method is not the best option for China. It defines that the host state must offer foreign investors with MST under CIL. Otherwise, it will face a liability. Based on the investment protectionist considerations of the capital-exporting countries, the host government's regulatory power may be restricted excessively by this method, which is not conducive to overseas investment cooperation. Moreover, as there is no agreement on what constitutes CIL or MST, it is also difficult for parties to foresee and control the tribunal's expansive explanation of this vague concept, so the open-enumerated method can not effectively limited the arbitration tribunal's discretion. Second, the full-enumerated method is also flawed. Although the closed enumeration method enables contracting states to control the content of FET, the specific content and number of enumerated elements will also affect the effectiveness of this method. In particular, the full-

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enumerated method adopted by India leaves no room for adjustment. Due to the fact that China's international investment law does not have a mature and stable practice in applying the FET standard, it will increase the time and energy cost of China to improve the FET standard in the treaties and agreements.

Due to China's dual needs to balance investors protection and host country's regulatory power, it is more suitable to learn from the EU model and adopt a semi-enumerated method to design FET clauses. First, the non-controversial elements that China recognizes, including "no denial of justice" and "non-discrimination and non-arbitrary treatment", could be regarded as necessary constituents of FET obligations. Second, apply the elements that remains controversial cautiously, such as "legitimate expectations of foreign investors". Specifically, China can adjust the general FET clauses flexibly in line with the domestic legal environments in another state. When China plays a main role as a capital-importing country, China can consider the inclusion of elements of "legitimate expectations of foreign investors" or "stability" to protect Chinese investors from high risks of policy adjustments. When it is mainly a capital-importing country, it is requisite to clearly explain and restrict the scope of key elements to limit the expanded interpretation by the arbitration tribunals. For instance, make it clear what kind of behavior constitutes a violation of the FET standard or use precise wording to expound the extent to reach a violation standard. Third, set up alternative mechanisms, such as allowing contracting states to modify the contents of FET elements through negotiation, or adding catch-all clauses to leave parties room for interpretation.

In 2020, two investors from Singapore, AsiaPhos and Goh Chin Soon, separately initiated arbitration against China under the 1985 China-Singapore Bilateral Investment Treaty. In 2021, Montenero, an investor from Switzerland, initiated arbitration against China under the 2009 China-Sweden Bilateral Investment Treaty. These three cases are still pending, but the FET clauses involved are all general provisions and are likely to be the basis of investors' claim of huge compensation. In addition, Chinese enterprises initiated two investment arbitration cases against ICSID as investors in 2023[34]. Recently, Ganfeng Lithium also announced that its investment arbitration case with the Mexico government has been officially registered with ICSID. Therefore, countermeasures are in need to quickly enhance the ability of China to cope with international investment disputes. Considering that the period of accumulation of talent training and response experience is long, this paper argues that experience can be accumulated indirectly by conducting more research on the latest international arbitration interpretations and summarizing the interpretation rules.

Some argue that the international investment law is based solely on the agreement between the states when interpreting the FET standard. As the tribunal in RosInvest Co UK Ltd. v. The Russian Federation proposed that a thorough examination of tribunal rulings on MFN clauses and arbitration submissions in other treaties is not necessary, and the main duty of Tribunals main duty is not to advance the general conversation about how MFN clauses apply to dispute-settlement provisions. but to render a decision in the case at hand [35]. However, almost all recent ICSID decisions regarding jurisdiction and merit awards contain references to past ICSID decisions [36]. Recently, the tribunal in Suez/AWG stressed that prior decisions that have struggled to interpret the FET standard in multiple factual situations were beneficial when interpreting a vague clause like FET [37]. Indeed, earlier decisions do not have binding force, but tribunals must explain why they use a different reasoning for the case than famous previous decisions on the same point. [38]. The path dependency existing in tribunals' interpretations of the FET standard and the evolving arbitration interpretations provide the basis for the effectiveness of indirect learning.

4. Conclusion

In conclusion, this paper has explored the developments of the FET standard in terms of treaty design and arbitration interpretations in recent years and expound the hidden problems and solutions to

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China's practice in the FET standard in recent decades. This paper mainly discusses the two most important aspects of the FET standard application: a restriction of the scope of protection in BITs & IIAs adjustments as well as increasingly specific but still inconsistent tribunals interpretations of FET, highlighting the complex influence of state practice and arbitration tribunal rulings on the development of the FET standard. In view of the complex changes in the international investment environment and the increasing risks of China's overseas investment, it is necessary for China to reflect on its backward treaty design and lack of arbitration experience. Then, China should actively find out the historical reasons and come out of feasible countermeasures, such as specifying its FET clauses in a semi-closed enumeration method and more precise expression and systematically studying arbitration tribunal interpretations of the FET standard elements as reference.

By comparing the latest development of FET standards, this paper points out the hidden problems existing in the application of FET standards in China, which makes up for the lack of focus on leading achievements of the FET standard worldwide in China's FET standard researches and provides a reference for other researchers to further study the best selection of China's FET standard reform path and test the effectiveness.

Moving forward, due to short duration of the FET standard reform in China, this paper fails to fully evaluate and foresee how China's FET standard should develop which must be further tested through a careful and long-term study of the new treaty language and existing ISDS case law. Moving forward, China will continue to reflect on its practice and keep to reform cautiously in FET standard to make better protection of China's oversea investments and Chinese investors' rights.

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